No. 11433

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT DEL GUERCIO, District Director Immigration and Naturalization Service, Department of Justice, District No. 16,

Appellant,

vs.

SEBASTIAN GABOT,

Appellee.

APPELLEE'S BRIEF.

L. A. GORDON and
HARRY WOLPIN,
1026 Black Building, Los Angeles 13,
Attorneys for the Appellee.

FILED

JAN 25 1947

PAUL P. O'BRIEN,
CLERK

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

Cases.

Statutes

No. 11433

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT DEL GUERCIO, District Director Immigration and Naturalization Service, Department of Justice, District No. 16,

Appellant,

vs.

SEBASTIAN GABOT,

Appellee.

APPELLEE'S BRIEF.

Appellant in his opening brief has cited and quoted from many cases laying down broad principles of law concerning the authority conferred by Congress upon the Immigration Service to deport "any alien who is hereafter sentenced to imprisonment for a term of one year or more because of a conviction of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States . . ." With none of these cases or principles so propounded does the appellee quarrel. It is the appellee's position that the instant case does not present facts bringing it within any of the precedents cited by the appellant. This is so obvious that no attempt will be made to deal with each case cited, but the appellee will confine his attack upon the appellant's brief to the one or two cases relied upon by the appellant which seem at all relevant, and to such of the appellant's argument as appears reasonably colorable.

Statement of the Case.

This is an appeal from an order of the United States District Court made and entered on the 21st day of June, 1946, granting a Writ of Habeas Corpus and discharging the appellee from custody. The appellee, who is a native and citizen of the Philippine Islands, had been taken into custody on April 16, 1946 for deportation, and was about to be transported to San Francisco, California, for embarkation when the Writ of Habeas Corpus proceedings were instituted, on June 11, 1946.

The undisputed facts of this case are that appellee was lawfully admitted to the Territory of Hawaii on September 9, 1927 and to the mainland of the United States on July 11, 1929. That he thereafter never left the continental United States except to make a trip to Tiajuana, Mexico, on March 20, 1934, returning four hours later through San Ysidro, California. [Tr. p. 43.] That on October 11, 1934 at San Luis Obispo, California, appellee killed one William A. B. Master and was on the 28th day of January, 1935, upon a plea of Not Guilty, convicted of the crime of Second Degree Murder and sentenced to serve five years to life in the California State Prison at San Quentin. That appellee was released from imprisonment on May 22, 1942.

Questions at Issue.

1. Did the District Court err in holding that the reentry of appellee into the United States from Mexico on March 20, 1934 was "an act of his" precluding deportation within the meaning of the regulation set forth in Section 172.9(a), Title 8, Code of Federal Regulations?

2. Is said regulation a valid exercise by the Immigration and Naturalization Service of the duty imposed upon

it to make reasonable rules and regulations necessary to carry out the provisions of the Acts of Congress relating to immigration?

3. Was the re-entry of the appellee on the 20th day of March, 1934, an entry within the express provisions of the Immigration Act of 1924?

Section 172.9 of the Code of Federal Regulations provides as follows:

> "All citizens of the Philippine Islands shall be subject to deportation and may be deported in the same manner, as aliens, with the following exceptions: (a) A citizen of the Philippine Islands who has resided in the United States continuously since April 30, 1934, shall not be subject to deportation for any act of his that occurred, or mental or physical defect that existed prior to May 1, 1934 . . ."

Since citizens of the Philippine Islands were exempt from the provisions of the Immigration and Naturalization Laws of the United States prior to the passage of the Tydings-McDuffy Act, no accurate record was kept of their entry or departure from the continental United States. It was for that reason determined that all Philippine citizens who resided in the United States continuously since April 30, 1934 should be presumed to have entered lawfully, just as it is presumed that all aliens who can prove that they resided in the United States since prior to June 30, 1906, are presumed to have entered lawfully and need no Certificate of Arrival in order to naturalize. (39 Stat. 874, 897 (1917); 8 U. S. C. Sec. 173 (1926).)

I.

The District Court Did Not Err in Holding That the Re-Entry of Appellee Into the United States From Mexico on March 20, 1934, Was an "Act of His" Precluding Deportation.

In determining that the appellee was entitled to his Writ of Habeas Corpus the Hon. Peirson Hall, Judge of the U. S. District Court said [Tr. pp. 78-80]:

> "There is no question here but that the petitioner has resided in the United States continuously since April 30, 1934. So the question to be decided and the question on which the case turns is whether or not any act of his, that is to say, he committed any act prior to May 1, 1934, which makes him subject to deportation.
>
> "There isn't any dispute but what the assault with a deadly weapon, or murder—which was it?
>
> "Mr. Wolpin: Second Degree Murder.
>
> "The Court: —second degree murder, for which he was convicted and sentenced to serve a term in the California prison, was committed on October 11, 1934, which was after May 1, 1934.
>
> "There isn't any doubt but what that was within the five-year period subsequent to his re-entry on March 20, 1934; and there isn't any doubt but what it is far beyond the five-year period subsequent to his original and only previous entry into the United States in September, 1927. So the question gets narrowed down still further to whether or not his re-

entry on March 20, 1934, was an act of his which occurred prior to May 1, 1934, which might subject him to deportation.

"I do not think that his re-entry alone would. But it is very plain also that the commission of the offense involving moral turpitude on October 11, 1934, alone would not have subjected him to deportation, had it not been for his act of voluntarily leaving the United States and returning on March 20, 1934, which he had a right to do, and which he did at a time when he was not an alien. I think it was an act within the terms and provisions of this regulation which occurred prior to May 1, 1934.

"Therefore, it took the concurrence of the two acts of the petitioner here, namely, the commission of the offense after May 1, 1934, which as I say, could not under any circumstances have subjected him to deportation had it not been for his previous act of voluntarily leaving the United States and returning on March 20, 1934, which was prior to May 1, 1934, and I think that under the regulations as promulgated by the department in their construction of the law, and enforcement of the law, as well as the various acts involved, that the petitioner is entitled to his writ, which will be granted."

Of course, it has always been, and it still is, the contention of the appellee that the offense committed by appellee was not committed within five years after entry, which point will be discussed and authority therefore cited in Point III.

II.

Said Regulation Is a Valid Exercise by the Immigration and Naturalization Service of the Duty Imposed Upon It to Make Reasonable Rules and Regulations Necessary to Carry Out the Provisions of the Acts of Congress Relating to Immigration.

Section 23 of 39 Stat. 892 provides as follows:

> "That the Commissioner General of Immigration shall . . . establish such rules and regulations . . . as he shall deem best for carrying out the provisions of this Act." (8 U. S. C. 102.)

It is too well settled to require the citation of authorities that the rules and regulations of the Immigration and Naturalization Service have the force and effect of law. (*Cf. Fok Yung Yo v. United States,* 185 U. S. 296, 303, 22 S. Ct. 686, 46 L. Ed. 917.)

This Court, in the case of *Chun Shee v. Nagle,* 9 F. (2d) 342 at page 343, said:

> "Section 23 of the same act (Barnes Code, Sec. 3726, 39 Stat. 892; Comp. St. Ann. Supp. 1919; Sec. 4289¼o) is as follows: The duties of the Commissioners of Immigration and other immigration officials in charge of districts, ports or stations shall be of an administrative character, to be prescribed in detail by regulations prepared under the direction or with the approval of the Secretary of Labor.
>
> "Pursuant to this authority regulations have been promulgated with the approval of the Secretary of Labor, defining the procedure in deportation hearings. It is conceded that these regulations have the force of law." Citing cases.

The Circuit Court of Appeals for the Third Circuit in the case of *Sibray v. United States,* 282 Fed. 795, in sustaining the action of the District Court in awarding the Writ of Habeas Corpus in a case in which the Immigration Service disregarded the Rules and Regulations of the Immigration and Naturalization Service, said at page 797:

> ". . . the contention is made that under certain circumstances it is discretionary with the inspector as to whether or not he will disregard the rules of the department, made pursuant to the authority of the statute. We are unable to subscribe to this proposition . . . If the appellant's position prevails, the administration of this statute will be according to the caprice of men, and not according to the fixed requirement of law. Aliens must be deported according to law, and not according to men. This statute must be administered according to its terms and the rules established by the Commissioner General of Immigration. Those charged with the enforcement are not at liberty in any particular case, and for reasons that may appeal to them at the moment to set aside any one of the rules on which the rights of the alien depend. . . . Congress, in its wisdom has enacted a statute, under the provisions of which, in accordance with the rules established by the Commissioner General of Immigration, certain aliens may be deported, and every alien charged with crime has the right to rely upon the observance of the statute and those rules by those charged with their enforcement in a proceeding to deport him . . ."

III.

Was the Re-Entry of the Appellee on March 20, 1934 an Entry Within the Express Provisions of the Immigration Act of 1924?

In the instant case, unlike all the cases referred to in his brief by the appellant, we have a United States National who went to Mexico for a period of four hours for the express purpose of getting married, returning by way of San Ysidro. Not being an alien, can we say that he made a re-entry under the provisions of the Immigration Act of 1924?

In the case of *Annello ex rel. Annello v. Ward, Commissioner*, 8 Fed. Supp. 797 at page 798, District Judge Brewster said:

> "The decision of the immigration authorities seems to be based . . . on the fact that he crossed Canadian territory in driving from Boston to Detroit, and back. As to the latter ground, obviously the Department disregarded the express provisions of the Immigration Act of 1924 (Act May 26, 1924, c. 190, Sec. 203 (4)), which defines an 'immigrant' to be one who departs from a place outside of the United States destined for the United States except' (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory."
>
> "The alien, having been lawfully admitted, was not subject to deportation unless his practically uninterrupted journey from Detroit to Windsor and back constituted an entry within the meaning of the immigration laws. Admittedly, the last entry rather than the original entry is to be considered in computing

the time within which the crime must have been committed." (Citing cases) . . .

"In my opinion it is carrying the application of the doctrine of the above cases too far to regard as an immigrant one who is lawfully within the country and who goes into foreign contiguous territory during the course of a practically continuous journey originating and ending at the same place within the United States. He does not, in my opinion, come within the statute, which defines an 'immigrant' as an alien departing from any place outside the United States destined for the United States; and it is equally absurd to hold that the alien's status has been affected by the fact that he remained in Windsor some 25 minutes while his uncle transacted his business.

"It is said in United States *ex rel.* Claussen v. Day, 279 U. S. 398, 49 S. Ct. 665, 77 L. Ed. 1298: 'The word "entry" by its own force implies a coming from outside. The context shows that in order that there be an entry within the meaning of the act there must be an arrival from some foreign port or place.' In the opinion, no distinction is made between the return to the same or another port of the United States. In order to uphold the decision of the immigration authorities it is necessary to hold either that the alien became an immigrant because he did not come from one place in the United States to another, or because his journey was interrupted by the 25 minute stay in Canada. In my opinion, such a strict, literal interpretation of the statute leads to results both absurd and unjust. For example: It would not seem reasonable to class one crossing from Detroit to Buffalo, by automobile, as an im-

migrant merely because, while going in transit from one part of the United States to another, he stopped to take on a supply of gasoline. But conceding that the alien does not come within the exceptions noted above, it is still necessary, in order to establish an entry within five years prior to the conviction, to show that the alien came within the statutory definition of an 'immigrant' when he returned from his trip to Windsor. As above indicated, this is not shown.

"For that reason I have reached the conclusion that the immigration authorities have proceeded upon a misconception of the law applicable to the undisputed facts of the case."

In the instant case, likewise, when the appellee crossed over from San Ysidro to Tiajuana to be married and returned within four hours after leaving, he did not enter or re-enter within the express provisions of the Immigration Act of 1924, not being an alien at the time but a national of the United States, and not having departed from any place outside the United States for the United States.

Not having entered the United States within five years of his conviction, appellee is not subject to deportation.

We respectfully submit that the District Court was correct in the conclusion reached in relation to the matters presented in this appeal—and that the order appealed from should be affirmed.

Respectfully submitted,

L. A. Gordon and
Harry Wolpin,
Attorneys for the Appellee.